**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **WILLIAM RYAN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 267,571 |
| **MANPOWER TEMPORARY SERVICES** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **ASSOCIATED INDEMNITY CORP.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier appealed the preliminary hearing Order dated September 27, 2001, entered by Administrative Law Judge Bryce D. Benedict.

## ISSUES

Claimant alleges he injured his bilateral upper extremities through the repetitive use of his hands each and every working day through March 6, 2001. The Administrative Law Judge (ALJ) granted claimant's request for medical treatment and authorized Regina M. Nouhan, M.D., to treat claimant's carpal tunnel syndrome.

Respondent and its insurance carrier (respondent) contend the ALJ erred in finding that claimant suffered accidental injury during the course of his employment for respondent, in finding that the claimant's need for medical treatment arose out of and in the course of his employment with respondent and in appointing an authorized treating physician when respondent had voluntarily provided an authorized treating physician.

## FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds that the ALJ's Order should be affirmed.

1. Claimant began working for respondent on Tuesday, February 27, 2001. He was initially assigned to the Armour-Swift plant and worked there until March 6, 2001.

2. Claimant worked for respondent at the Armour-Swift plant a total of seven days. The entire first day and part of the second were spent in orientation and training. Consequently, this time was not spent performing repetitive or hand-intensive tasks. Thereafter, claimant spent less than three days lifting pallets of sausages onto a conveyor belt. The next three days claimant performed the task of tying the ends of sausages.

3. When claimant advised respondent of symptoms in his hands, he was sent to receive medical treatment. Eventually, claimant was seen by orthopedic surgeon Gabriel S. Salzman, M.D. In addition to his physical examination, Dr. Salzman reviewed x-rays, electromyographic (EMG) testing and bone scans. Dr. Salzman diagnosed degenerative joint disease or arthritis as the cause of claimant's pain at the base of his thumbs. He also diagnosed mild carpal tunnel syndrome bilaterally. He referred claimant for a month of physical therapy and prescribed splints. But, in Dr. Salzman's opinion, claimant's carpal tunnel syndrome condition was not related to his employment at Armour-Swift. "Impression is of a very mild carpal tunnel syndrome. I do not feel this is work related. Carpal tunnel can come on from trauma. It can also come on from repetitive use, but not from less than a week."[1]

4. After completion of the bone scans, which showed significant increase in uptake at the carpometacarpal (CMC) joints of both thumbs, Dr. Salzman diagnosed degenerative joint disease and arthritis. In his May 10, 2001 progress record, Dr. Salzman also stated that:

> This is not a work-related injury. It did not occur during his limited time at Manpower. It has been something that has been developing. I'd be happy to see him back for treatment for this under his private insurance if he so chooses. I do not feel it is work related.[2]

5. Claimant worked light duty for respondent at a Salvation Army facility from March 9, 2001, until May 31, 2001. Thereafter, claimant worked at a variety of jobs for other employers.

6. Before working for respondent, claimant spent 20 years working at a Bristol-Myers-Squibb manufacturing facility until September 30, 1999. He subsequently worked in a correctional facility before going to work for respondent. Also, claimant lifted weights two to three times a week until February 2001.

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[1] April 26, 2001 letter by Gabriel S. Salzman, M.D., Claimant's Exhibit 1 to the Tr. of the September 26, 2001 Preliminary Hearing.

[2] Claimant's Exhibit 1, Tr. of Preliminary Hearing.

7. Claimant admitted to having prior problems with his left thumb and was treated by at least two physicians for this problem. He was previously diagnosed with arthritis in his thumb.

8. Following Dr. Salzman's conclusion that claimant's problems were not work related, respondent denied further medical care. He was sent by his attorney to plastic surgeon Regina M. Nouhan, M.D., on July 24, 2001. Dr. Nouhan concurred with Dr. Salzman's diagnosis and conclusion that the chronic, long-standing degenerative osteoarthritis of the bilateral thumb CMC joints was not likely related to his employment with respondent. However, Dr. Nouhan had a somewhat different opinion concerning claimant's probable bilateral carpal tunnel syndrome condition. In her July 24, 2001 report, Dr. Nouhan gives this impression:

> Probable bilateral carpal tunnel syndrome. It sounds to me as if this began as an acute episode of nerve inflammation/irritation, that temporarily does seem to be related to his activities at Armour-Swift, while under the employment of Manpower. This may not have been a true carpal "syndrome" at that early time of the initiation of his symptoms; however, it may have progressed into such with his subsequent activities. The fact that the patient had such an impressive initial presentation of his symptoms again suggests to me that this was an acute episode of perineural inflammation that reasonably could have and probably was a result of his work activities. It would be helpful to have a formal EMG be performed and interpreted by a physician. Now that it has been 3 months since the time of the nerve conduction study, it would [be] helpful anyway to look at the number values to see if the patient truly does have a nerve compression syndrome or if they have improved considerably.[3]

Dr. Nouhan goes on to recommend a repeat EMG and, if positive for carpal tunnel syndrome, she would recommend a steroid injection of at least one carpal tunnel to help delineate how much of claimant's current symptomatology is from nerve compression versus osteoarthritis of the thumb CMC joint.

9. Although Dr. Nouhan's report suggests an aggravation by claimant's subsequent work activities, not all of which were for respondent, thus raising the possibility of intervening accidents and injuries which could relieve respondent of liability for claimant's current treatment, Dr. Nouhan appears to foreclose this argument when she concludes her report with the following: "And to reiterate, the patient's osteoarthritis is not a direct result

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[3] Claimant's Exhibit 1, Tr. of Preliminary Hearing.

of his employment with Manpower. The bilateral median nerve irritation and possible CTS, however, in my opinion, certainly could be and likely is."[4]

## CONCLUSIONS OF LAW

1. For an injury to be compensable, a claimant must prove that the injury was caused by an accident which arose out of and occurred in the course of employment.[5] An injury is also compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] In such cases, the test is not whether the accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.[7]

2. Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.[8]

3. "Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.[9]

4. Claimant relates his injury to his work with respondent. One medical expert relates claimant's carpal tunnel syndrome condition to his work, whereas another excludes the work with respondent as a cause. Based upon the record compiled to date, the Appeals Board finds that claimant has proven he suffered accidental injury while working for respondent.

5. The ALJ did not exceed his jurisdiction by authorizing Dr. Nouhan to provide treatment. Claimant was forced to seek a preliminary hearing order for medical treatment because respondent had ceased providing medical treatment based on the opinion of Dr. Salzman that the claimant's problems were not work related. The ALJ found that

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[4] Claimant's Exhibit 1, Tr. of Preliminary Hearing.

[5] K.S.A. 44-501(a).

[6] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971); Hanson v. Logan U.S.D. 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* ___ Kan. ___ (2001).

[7] Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[8] K.S.A. 44-501(a).

[9] K.S.A. 44-508(g).

claimant was in need of medical treatment and that his carpal tunnel syndrome condition was work related. Accordingly, the ALJ had jurisdiction to order medical treatment.[10]

6. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[11]

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the September 27, 2001 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of December 2001.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director

[10] K.S.A. 44-534a. See also Weaver v. Buckeye Corporation, WCAB Docket No. 244,639 (Aug. 2000).

[11] K.S.A. 44-534a(a)(2).